May 10, 2001

(14)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 99-1786

In the Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, ET AL., PETITIONERS

v.

JANETTE KNUDSON AND ERIC KNUDSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a civil action brought under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(3), to redress a violation of, or to enforce, a term of a plan that requires a plan participant or beneficiary to reimburse the plan for medical expenses paid by the plan if the participant or beneficiary receives a recovery from a third-party tortfeasor, constitutes an action for "appropriate equitable relief" authorized by Section 502(a)(3).

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INTERESTS OF THE UNITED STATES

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. 1132(a)(3), authorizes an ERISA plan participant, beneficiary, or fiduciary to bring a civil action to obtain "appropriate equitable relief" to redress violations of, and to enforce, both the terms of the plan and Title I of ERISA, 29 U.S.C. 1101-1169 (1994 & Supp. V 1999). This suit was filed by an employee benefit plan, its administrator (as a fiduciary of the plan), and its insurer to enforce a term of the plan that requires a participant or beneficiary to reimburse the plan for medical expenses out of any funds recovered by the participant or beneficiary from a third-party tortfeasor. The question presented is whether the relief sought by the plan to obtain reimbursement constitutes equitable relief within the meaning of Section 502(a)(3).

The Secretary of Labor is authorized under Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), to bring civil actions to obtain "appropriate equitable relief" to redress violations of, and to enforce, Title I of ERISA. Accordingly, the Court's determination of what constitutes "appropriate equitable relief" may affect not only the scope of private civil actions under Section 502(a)(3) to enforce Title I, which are a necessary complement to actions by the Secretary, but also the scope of the Secretary's own authority to enforce Title I of ERISA.

STATEMENT

1. Petitioner Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. (the plan), is a medical and hospital benefits plan that qualifies as an employee welfare benefit plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. A2, C2. Petitioner Earth Systems, Inc. (Earth Systems), is the sponsor and administrator of the plan. J.A. 24-25, 89. Petitioner Great-West Life & Annuity Insurance Company (Great-West) is the stop-loss insurer for the plan and the assignee of the plan for purposes of obtaining reimbursement. Pet. App. A2, C2.[1]

Respondent Janette Knudson was seriously injured in an automobile accident on June 10, 1992. Pet. App. A2. At the time of the accident, she was covered by the plan as an eligible dependent because she was the spouse of respondent Eric Knudson, who was an employee of a wholly-owned

[1] The district court explained that "[t]he Plan had a 'Stop-Loss' insurance agreement with Great-West, whereby the Plan would pay any benefits up to $75,000 and Great-West would pay any excess amount. Additionally, the stop-loss allowed Great-West the right to recover first from amounts paid to the Plan by third parties. The stop-loss limits the Plan's risk of dissipating all of its assets for a single member." Pet. App. C2.

subsidiary of petitioner Earth Systems and a participant in the plan. *Id.* at A2, C2.

2. The summary plan description (SPD) for the plan[2] provided that, in the event a "third party may be liable or legally responsible for expenses incurred by a Covered Person for: an illness; or a sickness; or a bodily injury," the plan would pay the covered expenses, but would "have the right to recover from the Covered Person any payment for benefits paid for treatment of such [l]oss * * * which the Covered Person is entitled to receive from the third party." J.A. 58. The SPD further provided that the plan would "have a first lien upon any recovery, whether by settlement, judgment or otherwise, that the Covered Person receives" from the third party or the third party's insurer. *Ibid.* The lien was not to exceed "the amount of benefits paid" by the plan for the medical treatment or "the amount received by the Covered Person for such medical treatment from the third party." J.A. 59. The SPD also set forth certain conditions pertaining to the plan's right of recovery. First, it stated that the covered person must "cooperate fully" with the plan in asserting its right to recover. *Ibid.* Second, the SPD specified that, if the covered person received a recovery from a third party but failed to reimburse the plan, the person would be personally liable to the extent of the recovery from the third party up to the amount of the plan's

[2] Pursuant to Sections 101(a)(1) and 102(a)(1) of ERISA, 29 U.S.C. 1021(a)(1) and 1022(a)(1) (1994 & Supp. V 1999), a SPD must be furnished to all participants and beneficiaries of the plan. It must include specific information about the plan, including eligibility requirements and procedures for claim submissions. 29 U.S.C. 1022(a)(1) (1994 & Supp. V 1999). It must be "written in a manner calculated to be understood by the average plan participant" and "must be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a)(1) (1994 & Supp. V 1999). See *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83-84 (1995).

first lien. *Ibid.* Third, the SPD provided that, before the plan paid for treatment, it "may require the Covered Person to provide all information and sign and return all documents necessary to exercise [its] rights [of recovery] under this provision." *Ibid.*

Pursuant to those terms of the plan, petitioner Great-West, on behalf of the plan, notified respondent Eric Knudson on August 19, 1992, of the plan's entitlement to full reimbursement for any expenses paid on Janette Knudson's behalf, if any settlement or judgment was received from a court. J.A. 71-72. On September 30, 1992, Great-West wrote a similar letter to Janette Knudson. J.A. 75-76. Great-West explained that it was investigating the plan's possibilities for recovering from third parties, and it informed Janette Knudson of the plan's first lien right of recovery to any sums she received in settlement or in satisfaction of a judgment as a result of the accident. J.A. 75. Great-West also requested, in conformity with the plan, that she sign a right-of-recovery agreement. J.A. 75-76. Great-West's letter stated that any attorney representing Knudson should be given the correspondence and that any "[s]ettlement of this matter in contravention" of the terms in the letter "does not extinguish the Plan's rights in this matter or reduce its legal options." J.A. 76.

On October 20, 1992, respondent Eric Knudson signed the right-of-recovery agreement. See J.A. 77-78. In that agreement, he acknowledged that as a participant in the plan he had made a claim for covered medical benefits for his wife's injuries, and he requested that benefits be paid by the plan at that time "without the necessity of awaiting final determination of responsibility and with the understanding that no benefits may be payable and that another party or insurer may be liable for like benefits for which they will make payments." J.A. 77. Eric Knudson also agreed that the plan may be subrogated to any rights he or his dependent may

have to benefits from the other party; agreed to transfer to the plan any right he or his dependents may have to take legal action against the other party; and acknowledged that, under the terms of the plan, the plan may obtain reimbursement from him of any payment of benefits for which he or his dependents may be entitled to recover from a third party. J.A. 77-78. Eric Knudson further acknowledged that the plan "shall automatically have a first lien upon any recovery, whether by settlement, judgment or otherwise"; that "[s]aid first lien shall be for the amount of medical and hospital benefits paid by the Plan"; and that he would be personally liable to the plan "to the extent of such recovery up to the amount of its first lien." J.A. 78. Finally, Eric Knudson agreed "to cooperate fully with the Plan in asserting its rights to recover." *Ibid.*

The plan paid benefits on behalf of Janette Knudson in the form of medical expenses totaling $411,157.11. Pet. App. A2.

3. In 1993, respondents filed suit in state court against the manufacturer of the automobile that Janette Knudson was driving when she was injured and against others allegedly responsible for the accident. Pet. App. A2, B1, C2. The parties ultimately settled the case for $650,000. By orders dated July 23, 1997, and August 1, 1997, the state court approved the settlement and resolved the status of various competing liens against the settlement. *Id.* at A2, C3-C4.[3] The settlement allocated five percent of the award, or $13,828.70, to past medical expenses. *Id.* at A2, C3. Respon-

[3] Respondents did not make petitioners parties to the suit in state court, Pet. App. B2, C2-C3, and petitioners did not attempt to intervene in that action, *id.* at C2. Nevertheless, on April 21, 1997, petitioners removed the state-court action to federal court before the settlement was approved by the state court. *Id.* at B2, C3. On June 27, 1997, the district court remanded the case to the state court. It held that because petitioners were not parties to the state-court action, they had no right of removal under 28 U.S.C. 1441. Pet. App. B1-B4, C3.

dents tendered a check in that amount to petitioners, who rejected the payment because in their view the plan was entitled to payment in full of the $411,157.11 in medical expenses that it had paid on behalf of respondents. *Id.* at A2-A3, C3-C4. Petitioners requested that respondents' attorney segregate the settlement funds pending the outcome of the instant suit in federal court, but respondents' attorney declined because the monies had gone directly from the automobile manufacturer to a trust established for Janette Knudson. *Id.* at C4.

4. a. Meanwhile, on May 19, 1997, petitioner Great-West had filed the instant action under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), to enforce the reimbursement provision of the plan through equitable and declaratory relief. J.A. 81-86. On July 3, 1997, Great-West, now joined by petitioners Earth Systems and the plan, filed a first amended complaint (see J.A. 87-95) requesting injunctive relief to prevent respondents from violating the plan by refusing to agree to reimburse it; to enforce the terms of the plan by requiring respondents to make reimbursement in the amount of $411,157.11 out of any proceeds recovered from third parties; and to prevent respondents from disposing of any funds received pursuant to a settlement because respondents had failed to honor petitioners' subrogation rights under the plan. J.A. 92-94. Petitioners also requested a declaration that respondents are required to reimburse the plan $411,157.11 out of any proceeds they recover from third parties, J.A. 93, a temporary restraining order to prevent respondents from seeking state-court approval of the settlement, *ibid.*, and "any other relief to which [the plan] is entitled," as well as attorney's fees. J.A. 95.[4]

[4] On July 9, 1997, the district court denied petitioners' request for a temporary restraining order. J.A. 96-99.

b. On May 14, 1998, the district court, ruling on cross-motions for summary judgment, entered judgment for respondents. Pet. App. C1-C12. The district court held that petitioners' rights under the plan were limited to the portion of the state-court settlement that was attributed by the state court to past medical expenses. *Id.* at C10.[5] The court rejected as arbitrary and capricious the plan administrator's interpretation of the plan to allow petitioners to be "reimbursed 100% of any third party recovery," because the court interpreted the plan to limit reimbursement to the lesser of "the amount of benefits paid out" by the plan ($411,157.11) *or* "the amount received from a third party for medical treatment," which the court understood here to be "the portion of the $650,000 [settlement] that is attributable to medical expenses." *Id.* at C9-C10.[6] The court held that because

[5] The district court rejected petitioners' argument that the state court lacked subject matter jurisdiction to determine the plan's lien rights. Pet. App. C5-C7. The district court held that the state court had concurrent jurisdiction under Section 502(a)(1)(B) and (e)(1) of ERISA, 29 U.S.C. 1132(a)(1)(B) and (e)(1), because "[t]he state court action to determine the status of liens on Janette Knudson's recovery is an action to enforce her rights under the terms of the * * * Plan." Pet. App. C6. If this Court reverses the court of appeals' holding that petitioners have no cause of action under Section 502(a)(3) of ERISA, the court of appeals may consider on remand whether the district court correctly held that the state court had jurisdiction to determine the plan's lien rights and whether petitioners could in any event be bound by the state court's determination of that issue even though they were not parties to the state-court action. See *Martin* v. *Wilks*, 490 U.S. 755, 762 & n.2 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings," except in certain limited circumstances.).

[6] The district court disregarded the right-of-recovery agreement signed by respondent Eric Knudson because, in the court's view, that agreement misstated the terms and obligations of the plan, lacked consideration, and deviated from the plan without a formal plan amendment. Pet. App. C8-C9. In particular, the court noted that although the agreement extended reimbursement to "'any' third party recovery," *id.* at C8,

the state court concluded that five percent of the settlement is attributed to petitioners' lien, petitioners' right of recovery in this action is limited to that amount.

5. a. The court of appeals affirmed the district court's judgment, but on different grounds. Pet. App. A2-A4. The court explained that Section 502(a)(3) of ERISA authorizes only an action for equitable relief, and that, in *FMC Medical Plan* v. *Owens*, 122 F.3d 1258 (9th Cir. 1997), it had held that "reimbursement of payments made to a beneficiary of an insurance plan by a third party, which [petitioners] seek here, is not equitable relief within the meaning of § 1132(a)(3)." Pet. App. A3-A4.[7] The court of appeals rejected petitioners' argument that *Owens* was wrongly decided and declined petitioners' request for en banc review, noting that it had recently reaffirmed the *Owens* holding in *Reynolds Metals Co.* v. *Ellis*, 202 F.3d 1246 (9th Cir.), cert. dismissed, 121 S. Ct. 674 (2000). Pet. App. A4.

b. The *Owens* decision, which the panel in this case felt bound to follow, held that under *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), the term "equitable relief" must be given a "narrow construction" for purposes of Section 502(a)(3) of ERISA, see 122 F.3d at 1262, and relief is limited to "injunction, mandamus, and restitution," *id.* at 1260-1261. The Ninth Circuit concluded in *Owens* that the complaint in that case—which sought reimbursement out of a partici-

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the plan itself, in the court's view, limited reimbursement to "the amount received from a third party for medical treatment," *id.* at C10.

[7] The court noted that the *Owens* panel had ordered dismissal for lack of subject matter jurisdiction, while in *Cement Masons Health & Welfare Trust Fund* v. *Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999), petition for cert. pending, No. 99-1403, the panel ordered dismissal of the same type of claim on the merits, Pet. App. A4—*i.e.*, for failure to state a claim on which relief could be granted. For purposes of this case, the panel here noted, in evaluating the substantive holding of *Owens*, "the dismissal could be based either on lack of subject matter jurisdiction or on the merits." *Id.* at A4 n.5.

pant's third-party recovery for benefits paid by the plan—did not purport to seek either an injunction or mandamus. The court also concluded that restitution was not available because, in its view, *Mertens* holds that restitution consists only of the return of "ill-gotten" assets or profits taken from a plan, *id.* at 1261, and the participant in *Owens* had obtained the payments from the plan pursuant to its terms, not by any fraud or wrongdoing. The court held that, under the construction of Section 502(a)(3) it believed was "mandated by *Mertens*," a claim for reimbursement is not authorized in those circumstances. *Id.* at 1262. The court instead viewed the suit as a "breach of contract claim" in which the remedy sought was "money damages for [the participant's] alleged breach," and it held that such relief is not available under Section 502(a)(3). *Id.* at 1261-1262.

For similar reasons, the Ninth Circuit in *Owens* rejected the contention that a constructive trust could be imposed. The court recognized that the Ninth Circuit had previously held that a constructive trust constitutes an equitable remedy under ERISA. But it held that remedy was unavailable in *Owens* because "a constructive trust is born from some form of ill-gotten gain of another's property," and the participant in *Owens* had not obtained the payment of medical expenses from the plan "by any form of fraud, duress, or unconscionable behavior," or as a result of any breach of fiduciary duty. 122 F.3d at 1261.[8]

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[8] The Ninth Circuit reaffirmed the substantive holding of *Owens* in *Cement Masons* (see note 7, *supra*), holding that, like *Owens*, the case involved a claim for contractual reimbursement, and not restitution, because the participant did not receive the payments from the plan through fraud or wrongdoing. 197 F.3d at 1006-1007. The court rejected the argument that *Cement Masons* was distinguishable from *Owens* because the plan in *Cement Masons* established an automatic lien on any third-party recovery. The court held that the plan's request for declaratory and injunctive relief regarding the propriety of enforcing the lien was

SUMMARY OF ARGUMENT

A. A civil action constitutes an action for "appropriate equitable relief" within the meaning of Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), when it seeks to redress a violation of, or to enforce, a term of an ERISA plan that requires a participant or beneficiary to reimburse the plan out of a recovery from a third-party tortfeasor. The court of appeals erred in characterizing such an action as one seeking money damages for a breach of contract, which constitute legal relief not available under Section 502(a)(3). That characterization disregards both the strong support in traditional equitable principles for requiring such relief, and this Court's holding that the common law of trusts provides a "starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (quoting *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 447 (1999)).

Consistent with those principles, an action to enforce a reimbursement term of a plan is properly viewed as an action for equitable relief because it seeks to prevent unjust enrichment of the participant or beneficiary and because the relief is measured by the unjust gain to the defendant, not by the loss to the plan. Such a reimbursement action is analo-

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nothing more than a request for "a mechanism to enforce, or to obtain the equivalent of, a damage remedy." *Id.* at 1007.

In *Ellis*, the Ninth Circuit again reaffirmed *Owens*, rejecting the Eleventh Circuit's view that *Owens* was "based on an 'unduly narrow reading of *Mertens*.'" 202 F.3d at 1248 (quoting *Blue Cross & Blue Shield* v. *Sanders*, 138 F.3d 1347, 1353 n.5 (11th Cir. 1998)). The Ninth Circuit reasoned that *Owens* does not conflict with *Mertens* because *Owens* does not bar all claims for monetary relief under Section 502(a)(3) and recognizes that restitution and constructive trusts may be appropriate, "provided some fraud or wrong-doing is shown." *Id.* at 1249.

gous to a traditional suit in equity to enforce an agreement by a beneficiary to pay money into a trust, or to obtain repayment from a beneficiary of an advance made from a trust.

B. In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), the Court held that "appropriate equitable relief" under Section 502(a)(3) means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256. Equity typically provided a variety of remedies to prevent unjust enrichment, including restitution, constructive trust, equitable lien, subrogation, and specific performance. A court sitting in equity has the flexibility to choose which of those types of relief is most appropriate in the circumstances of the particular case.

C. The Ninth Circuit is wrong in believing that *Mertens* limits the availability of restitution and constructive trusts in actions under Section 502(a)(3) to cases involving fraud or other wrongdoing. Under the court of appeals' view, the reimbursement terms of an ERISA plan cannot be enforced under Section 502(a)(3) because the participant or beneficiary was authorized to receive payment from the plan as an initial matter. But the *Mertens* Court referred to the availability of "restitution of ill-gotten plan assets or profits" merely as an example of "appropriate equitable relief" under Section 502(a)(5); the Court did not purport to limit restitution to those circumstances. 508 U.S. at 260. Indeed, elsewhere in *Mertens* the Court explained, without further limitation, that "equitable relief" under Section 502(a)(3) means "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256 (emphasis omitted). Under well-established principles of equity, wrongdoing is not an essential element of a claim for

restitution or a constructive trust, as the Court recently confirmed in *Harris Trust*, 530 U.S. at 251.

ARGUMENT

AN ACTION MAY BE BROUGHT UNDER SECTION 502(a)(3) OF ERISA TO ENFORCE OR REDRESS A VIOLATION OF AN ERISA PLAN TERM THAT REQUIRES A PARTICIPANT OR BENEFICIARY TO REIMBURSE THE PLAN FOR MEDICAL EXPENSES RECOVERED FROM A THIRD PARTY

Section 502(a)(3) of ERISA provides, *inter alia*, that a fiduciary of a plan governed by ERISA may bring a civil action "to enjoin any act or practice which violates * * * the terms of the plan," and "to obtain other appropriate equitable relief * * * to redress such violations or * * * to enforce * * * the terms of the plan." 29 U.S.C. 1132(a)(3).[9] In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), the Court held that, for purposes of Section 502(a)(3), "equitable relief" does not mean whatever relief could have been provided in a case by a court in equity, because that category would include remedies that are traditionally legal, but that an equity court could grant in certain circumstances. *Id.* at 256-257. Rather, the Court held that the term "equitable relief," as used in Section 502(a)(3), means "those categories of relief that were *typically* available in equity (such as

[9] Section 502(a)(3) authorizes suits by "a participant, beneficiary, or fiduciary." 29 U.S.C. 1132(a)(3). Petitioners alleged in their first amended complaint that petitioner Earth Systems is the plan administrator and, as such, is authorized to bring the action under Section 502(a)(3). J.A. 89. We agree that Earth Systems, as the plan administrator, is a fiduciary of the plan, see 29 U.S.C. 1002(21)(A), and, thus, authorized to bring an action under Section 502(a)(3). The Court need not determine the status of the other petitioners or their authority to sue under Section 502(a)(3). See *Health Cost Controls of Ill., Inc.* v. *Washington*, 187 F.3d 703 (7th Cir. 1999) (Posner, C.J.) (holding that the assignee of a plan may sue under section 502(a)(3)), cert. denied, 528 U.S. 1136 (2000).

injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256. The Court stated, for example, that, under Section 502(a)(3), a defendant "may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees." *Id.* at 262.

In their first amended complaint, petitioners sought relief that is typically available in equity, including an injunction to enforce the terms of the plan that expressly provide for reimbursement, to prevent respondents from violating those terms, to require respondents to reimburse the plan in "the amount of $411,157.11 out of any proceeds they recovered from third parties," and to prevent respondents from disposing of any funds received pursuant to settlement of their claims against third parties. J.A. 92, 94-95. They also sought "any other relief" to which they are entitled. J.A. 95. Petitioners' suit thus comes within the plain meaning of Section 502(a)(3) as a suit to enjoin an act that violates the terms of a plan, and to obtain other "appropriate equitable relief" to redress such a violation and to enforce the terms of a plan.

The Ninth Circuit's contrary conclusion was based on its view that reimbursement of funds to a plan out of payments made to a participant or beneficiary by a third party is not equitable relief. Pet. App. A3-A4. That conclusion rests on two faulty premises. First, the Ninth Circuit believed that an action to enforce a reimbursement term of a plan is a suit seeking "money damages" for a breach of contract, a form of legal relief that is not available under Section 502(a)(3). *Owens*, 122 F.3d at 1261-1262; *Cement Masons*, 197 F.3d at 1006-1007. Second, the Ninth Circuit believed that equitable relief in the form of restitution or a constructive trust is not available in actions to enforce a reimbursement term of a plan because the plan participant or beneficiary from whom reimbursement is sought did not obtain the plan funds in the

first instance through fraud or other wrongdoing. *Ibid.* Both of those premises are contrary to this Court's precedents and must be rejected to ensure proper enforcement of ERISA plans.

A. A Suit To Enforce A Reimbursement Term Of An ERISA Plan Constitutes An Action For Appropriate Equitable Relief, Not Money Damages, Because It Seeks To Prevent Unjust Enrichment

1. An action to enforce a term of an ERISA plan that requires a participant or beneficiary to reimburse the plan for expenses recovered from a third party is an action to prevent the participant or beneficiary from being unjustly enriched. When a plan expressly conditions the payment of medical benefits on subsequent reimbursement to the plan out of funds recovered by the participant or beneficiary from a third-party tortfeasor, the participant or beneficiary is unjustly enriched when he or she retains the amount recovered from a third party and does not reimburse the plan. An action to enforce such a reimbursement term is properly brought as an equitable action to prevent unjust enrichment through that double recovery. Restatement of Restitution § 1, at 12-15 (1937).

The relief sought in an action to remedy unjust enrichment is measured by the unjust gain to the defendant, not by the harm to the plaintiff. Consistent with that theory of recovery, petitioners sought reimbursement from respondents in "the amount of $411,157.11 *out of any proceeds they recovered from third parties.*" J.A. 92 (emphasis added).[10]

[10] The district court concluded that the plan and the right-of-recovery agreement differed regarding the scope of reimbursement required. See note 6, *supra*. The court of appeals did not address that ruling and related questions regarding the proper interpretation of the plan, the meaning and validity of the right-of-recovery agreement, and the effect of the state-court judgment. Those issues may properly be considered by the court of appeals on remand.

Moreover, unlike an award of money damages, which "substitutes money for the original condition or thing to which the plaintiff was entitled," the reimbursement sought here would give petitioners the very thing to which they are entitled under the terms of the plan. 1 D. Dobbs, *Law of Remedies* § 3.1, at 279-280 (2d ed. 1993). A judicial order requiring respondents to reimburse the plan in accordance with the plan terms is the sort of relief that is typically available in equity because it would compel specific performance of an obligation to pay money. Indeed, it would compel reimbursement of payments that were previously made by the plan on the *express condition* that reimbursement would be required if the participant or beneficiary recovered from a third party.

If a beneficiary's recovery from a third-party is less than the total expenses paid by the plan, the plan may not obtain reimbursement in excess of the third-party recovery. And the plan may not recover damages to compensate the plan for the loss of the use of the funds between the time it paid the medical benefits on behalf of the beneficiary and the latter's recovery from the third party. Petitioners' action thus seeks merely to restore the status quo and to prevent unjust enrichment to the extent of respondents' recovery from the third party. Cf. *Tull* v. *United States*, 481 U.S. 412, 422 (1987). If equitable reimbursement is ordered in these circumstances, respondents will not lose anything to which they are entitled under the terms of the plan, and the plan will not gain anything to which it is not entitled under the terms of the plan.

2. Petitioners' suit is not an action for contract damages, as the court of appeals would have it. See Pet. App. A3-A4; *Owens*, 122 F.3d at 1262. That characterization of the suit disregards the background of trust law against which ERISA plans are established and instead treats the parties'

relationship as a garden-variety, arms'-length contract.[11] An ERISA plan, like an ordinary trust, is not merely one type of contract. G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 17, at 215-216 (rev. 2d ed. 1984); cf. *Chauffeurs Local No. 391* v. *Terry*, 494 U.S. 558, 568 (1990) ("The nature of an action is in large part controlled by the nature of the underlying relationship between the parties."). In particular, the assumption of fiduciary duties under an ERISA plan is analogous to the assumption of such duties under an ordinary trust, which is based not on contract, "but rather on the effect of a conveyance" that confers upon beneficiaries an equitable interest in the trust res. G. Bogert & G. Bogert, *supra*, § 17, at 215-216.[12]

Some ERISA plans do not provide for a formal trust account. For example, employee welfare benefit plans, such as the plan in this case, are exempt from ERISA's minimum

[11] Of course, for the reasons already discussed, even in the case of an ordinary contract, an equitable action will lie to prevent unjust enrichment and to compel specific performance of an obligation to pay money.

[12] Although employers typically contribute the bulk of the funds for ERISA health plans, the employees who participate in and are beneficiaries of the plan often contribute substantial amounts as well. Employees of small firms pay on average 33% of health plan premiums, while employees in large firms pay 22%. See Pet. at 6-7, *Reynolds Metals Co.* v. *Ellis*, *supra* (No. 99-1787) (citing *Private Health Insurance—Impact of Premium Increases on Number of Covered Individuals Is Uncertain: Hearings Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 106th Cong., 1st Sess. (1999) (statement of William J. Scanlon, Director, Health Financing and Public Health Issues, General Accounting Office)). In addition, employer-funded plans can arise by virtue of collective bargaining agreements, in which, presumably, employee-beneficiaries expressly trade off other benefits, such as higher wages, for medical insurance. The beneficiaries contribute in that way as well, albeit indirectly. See Central States Mot. for Leave to File Amicus Curiae Br. in Support of Pet. 1. Indeed, benefits under an ERISA health plan may generally be considered an example of compensation in lieu of salary because they are part of an employee's overall compensation package.

funding standards, see 29 U.S.C. 1081(a)(1), and do not generally establish trust accounts, although if the plan receives contributions from participants or beneficiaries, it must segregate such plan assets from the employer's general assets, 29 C.F.R. 2510.3-102. The Court has made clear, however, that the type of plan involved in a particular case does not alter the analysis under ERISA where the statutory text does not distinguish between different types of plans. See *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 105, 111 (1989) (Court guided by principles of trust law in case involving employee welfare benefit plan for which separate trust fund had not been established); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 443-444 (1999) (plan sponsors who alter the terms of a plan are not fiduciaries, and "are analogous to the settlors of a trust," regardless of whether the plan is a pension benefit plan, a welfare benefit plan, a contributory plan, a noncontributory plan, or "any other type of plan") (citation omitted).

This Court has repeatedly held that the common law of trusts provides a "starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (quoting *Hughes Aircraft Co.*, 525 U.S. at 447); see also *Firestone Tire & Rubber Co.*, 489 U.S. at 110-111. Reference to the common law of trusts in this case demonstrates the appropriateness of several equitable remedies in a case such as this.

As beneficiaries of an ERISA plan, respondents owe various duties to the plan, and they would owe duties to other beneficiaries under established common-law trust principles. "Co-beneficiaries are owners of equitable interests in the same res * * * . They are in a fiduciary relation to each other in the sense that one beneficiary may not secretly secure for himself a special advantage in the

trust administration." G. Bogert & G. Bogert, *supra*, § 191, at 478 (1979); see also Restatement (Second) of Trusts §§ 251-255, at 633-642 (1959) (describing duties and liabilities of beneficiary to trust); 3A A. Scott & W. Fratcher, *The Law of Trusts* §§ 250-254, at 358-378 (4th ed. 1988) (same).

Moreover, suits could typically be brought in equity to enforce an agreement by a beneficiary to pay money into a trust. 3A A. Scott & W. Fratcher, *supra*, § 252, at 366; Restatement (Second) of Trusts, *supra*, § 252, at 635-636. An action likewise could be brought in equity against a beneficiary for instigating a breach of trust and to restore payments improperly made to the beneficiary from the trust. G. Bogert & G. Bogert, *supra*, § 191, at 478-485; 3A A. Scott & W. Fratcher, *supra*, §§ 253-254.2, at 368- 378; Restatement (Second) of Trusts, *supra*, §§ 253-254, at 636-640. And an equitable action was available against a beneficiary for repayment of an advance made by the trust. *Id.* § 255, at 640-642. See generally 3A A. Scott & W. Fratcher, *supra*, §§ 251, 252, at 363, 366 (A beneficiary may be liable to the trust estate based on the broad equitable principle that "a person entitled to participate in a fund and also bound to contribute to the same fund cannot receive the benefit without discharging the obligation.").

An action to enforce the reimbursement terms of an ERISA plan in order to prevent unjust enrichment of a participant or beneficiary fits comfortably within the scope of those traditional claims in equity. Such an action is analogous to both an action to enforce an agreement by the beneficiary to pay money into the trust, and an action for repayment of an advance made from the trust. Like those actions, reimbursement pursuant to the terms of an ERISA plan furthers the underlying trust objectives and enhances the functioning of the plan by providing specified benefits to all employees and their dependents, while also containing costs and preserving the plan assets to satisfy further

claims. *Mertens*, 508 U.S. at 262-263; *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996).

B. "Equitable Relief" Includes An Order To Prevent Unjust Enrichment Resulting From A Participant's Or Beneficiary's Failure To Abide By A Reimbursement Term Of An ERISA Plan.

1. Petitioners' action for reimbursement seeks equitable relief within the meaning of Section 502(a)(3) notwithstanding that it would, if successful, result in an order for payment of money. This Court has expressly recognized that an award of monetary relief is not necessarily legal relief. In *Chauffeurs Local No. 391*, the Court explained, for example, that monetary relief is equitable where it is "restitutionary, such as in 'action[s] for disgorgement of improper profits,'" 494 U.S. at 570 (quoting *Tull*, 481 U.S. at 424), and where it is "incidental to or intertwined with injunctive relief," *id.* at 571 (quoting *Tull*, 481 U.S. at 424); see also *Harris Trust*, 530 U.S. at 240 (discussed at pp. 29-30, *infra*); *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946). And the Court also has held in other circumstances that a suit for monetary reimbursement may be considered to be one for "specific relief" rather than "money damages." See *Bowen* v. *Massachusetts*, 487 U.S. 879, 893-896, 899-901 (1988).[13]

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[13] In *Bowen* v. *Massachusetts*, the Court held that the provision of the Administrative Procedure Act that precludes actions against federal agencies seeking "money damages" (see 5 U.S.C. 702) does not bar a district court action by a State seeking review of a decision by the Department of Health and Human Services denying reimbursement for certain expenditures under the State's Medicaid program. The Court held that the State's request for monetary relief was in the nature of an equitable action for specific relief to obtain money to which the State allegedly was entitled under the federal Medicaid statute. See also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) ("*Bowen*'s interpretation of § 702 thus hinged on the distinction between specific relief and substitute relief, not between equitable and nonequi-

As we explain below, restitution and specific relief are but two of a number of remedies typically available in equity that may be appropriate in an action under Section 502(a)(3) of ERISA to enforce a term of a plan providing for reimbursement to the plan out of a third-party recovery. Whether the appropriate remedy in any particular case is restitution, specific relief, or another form of equitable relief may depend on the circumstances of that case. Flexibility in determining the nature of the relief that is appropriate in a given case is characteristic of suits in equity. Accordingly, courts entering an equitable judgment "may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties." 1 J. Story, *Equity Jurisprudence* § 28, at 24 (14th ed. 1918); see, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-417 (1975).

Moreover, because of the expansive preemption provisions of ERISA, which supersede state laws that relate to covered employee benefit plans (29 U.S.C. 1144(a); see *Egelhoff* v. *Egelhoff*, 121 S. Ct. 1322 (2001)), a cause of action presumably would not lie against a participant or beneficiary under state law to enforce a reimbursement term of a plan. Compare *FMC* v. *Holliday*, 498 U.S. 52 (1980) (ERISA preempts state law precluding self-funded employee welfare benefit plans from exercising rights under plan provisions requiring member to reimburse plan if member recovers from third-party tortfeasor). An action under Section 502(a)(3) therefore is likely to be the only avenue of relief for a plan fiduciary. Thus, adoption of the Ninth Circuit's view—that Section 502(a)(3) is not available to enforce such a reimbursement term—could render such a plan term

table categories of remedies."). Although *Bowen* and *Blue Fox* addressed a distinct question concerning the meaning of "money damages" in 5 U.S.C. 702, those cases are instructive insofar as they recognize that some actions for monetary relief *are* suits for "equitable" relief.

altogether unenforceable, contrary to the purposes of ERISA.

2. Consistent with the principles set forth above, the courts of appeals have recognized various types of equitable relief in actions under ERISA plans that provide for reimbursement to the plan out of a third-party recovery, recognizing that, whatever remedy is used to afford relief, the plan fiduciary is "seeking an equitable remedy against [the participant or beneficiary] to ensure her compliance with the terms of the Plan." *Administrative Comm.* v. *Gauf*, 188 F.3d 767, 770 (7th Cir. 1999) (citing as examples the fiduciary plaintiff's request for "'specific performance and enforcement' of the contract and an 'order enjoining [the participant] from continuing to violate the terms of the plan'").[14] Providing appropriate equitable relief to plan fiduciaries to enforce reimbursement terms of ERISA plans helps to maintain plan assets for the benefit of all beneficiaries, and furthers one of the stated purposes of ERISA—that of "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). See also *Varity Corp.*, 516 U.S. at 512 (characterizing Section 502(a)(3) as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy").

[14] ERISA plans attach different labels to the right of the plan to recover previously-made payments out of a third-party recovery received by a participant or beneficiary, and sometimes use differing terms interchangeably. See 16 L. Russ, *Couch on Insurance* § 226:1, at 226-11, § 226:4, at 226-15 to 226-17 (3d ed. 2000); see also *id.* § 222:2, at 222-11 to 222-12 ("The right of an insurer to recover payments made pursuant to its policy from a third party which caused the loss, or from the person to whom the payment was made, generates considerable confusion because of overlap between, and misuse of," the terms "subrogation," "recoupment," "restitution," reimbursement," and "recovery."); *id.* § 222.22, at 222-13 to 222-14 (noting distinctions among subrogation, liens, and assignments).

a. An action for reimbursement to prevent unjust enrichment may properly be brought as an equitable action seeking restitution. See Restatement of Restitution, *supra*, § 1, at 12-15 (restitution is an appropriate equitable remedy to prevent unjust enrichment); 1 D. Dobbs, *supra*, § 4.1(1), at 552, 556 (same). "Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'" *Tull*, 481 U.S. at 424 (quoting *Porter*, 328 U.S. at 402). Restitution to prevent unjust enrichment, which is measured by the defendant's gain, not the plaintiff's loss, differs in "goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." 1 D. Dobbs, *supra*, § 4.1(1), at 555; Restatement of Restitution, *supra*, § 1, cmt. e at 14.[15]

In *Harris Trust*, this Court held that restitution is available under Section 502(a)(3) to remedy violations of Title I of ERISA. 530 U.S. at 243, 250-251, 253 (restitution available against nonfiduciary party in interest who participated in prohibited transaction). Because Section 502(a)(3) affords the same relief for violations of a plan as it does for violations of the Act itself, restitution should likewise be available here to enforce a reimbursement term of the plan. Here, of course, petitioners seek restitution from a beneficiary who is *retaining* funds in contravention of the terms of the plan, even though there was no violation of the plan when the funds were first advanced to the beneficiary. The Seventh Circuit has specifically held that a suit for restitution in comparable circumstances is an action for "appropriate

[15] Although restitution may be viewed as a legal remedy when awarded in an action at law, it is properly viewed as equitable relief where, as here, it is sought in a traditional action in equity to prevent unjust enrichment. See *Reich* v. *Continental Cas. Co.*, 33 F.3d 754, 755-756 (7th Cir. 1994) (Posner, C.J.), cert. denied, 513 U.S. 1152 (1995). See also *Washington*, 187 F.3d at 710.

equitable relief" under Section 502(a)(3), see *Harris Trust & Sav. Bank* v. *Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (1995), and the Fourth Circuit has expressed a similar view, see *Provident Life & Accident Ins. Co.* v. *Waller*, 906 F.2d 985, 988 n.5, cert. denied, 498 U.S. 982 (1990). Those courts articulated similar standards for establishing an entitlement to restitution and determined that the plan's reimbursement claim before them easily sufficed.[16] As the Fourth Circuit put it, "the facts of the instant case fit the archetypal unjust enrichment scenario. * * * [T]he result in this case is an inequitable one; the record indicates [the beneficiary] received a double recovery despite knowing about the plan's reimbursement provision." *Id.* at 993.

b. A constructive trust is another appropriate equitable remedy in an action under Section 502(a)(3) of ERISA seeking reimbursement out of a third-party recovery. This Court described that remedy in *Harris Trust*: "Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein.'" 530 U.S. at 250-251 (quoting *Moore* v. *Crawford*, 130 U.S. 122, 128 (1889), and 4 J. Pomeroy, *Equity Jurisprudence* § 1053, at

[16] Although the Fourth Circuit in *Waller* found a cause of action for restitution under federal common law, and did not rest its decision on Section 502(a)(3) (see 906 F.2d at 988 n.5, 992-994), it, like the Seventh Circuit in *Harris Trust & Savings Bank* v. *Provident Life & Accident Insurance Co.*, looked to the elements of restitution as described by Professor Corbin: (1) the plaintiffs had a reasonable expectation of payment; (2) the defendants should reasonably have expected to pay, and (3) society's reasonable expectations of person and property would be defeated by nonpayment. See 906 F.2d at 993-994, and 57 F.3d at 615 (both citing C. Kaufman, *Corbin on Contracts* § 19A, at 50 (Supp. 1989)).

119-120 (5th ed. 1941)); accord, *e.g.*, Restatement of Restitution, *supra*, § 160, at 640; 1 D. Dobbs, *supra*, § 4.3(1), at 587. ERISA's legislative history specifically identifies a constructive trust as an example of "appropriate equitable relief." S. Rep. No. 383, 93d Cong., 1st Sess. 105 (1973) ("Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries."). Consistent with that congressional intent, the Seventh Circuit has correctly held that an action by a plan administrator against a beneficiary for reimbursement of medical benefits as called for by the plan may properly be treated as an action to impose a constructive trust on funds the beneficiary received from a third party, and thus constitutes an action for appropriate equitable relief under Section 502(a)(3). *Health Cost Controls of Ill., Inc.* v. *Washington*, 187 F.3d 703, 710-711 (1999) (Posner, C.J.), cert. denied, 528 U.S. 1136 (2000).

c. Claims such as petitioners' may also properly be characterized as actions "seeking to impose an equitable lien on the [funds received from a third party] or seeking a mandatory injunction directing [the participant or beneficiary] to sign over her claim to the money." *Washington*, 187 F.3d at 711. An equitable lien is another equitable remedy intended to prevent unjust enrichment and may arise out of an express agreement or may be judicially implied. 1 D. Dobbs, *supra*, § 4.3(3), at 601; G. Bogert & G. Bogert, *supra*, § 32, at 395-401; see also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 264-265 (1999) (recognizing propriety of imposing an equitable lien to obtain a security interest in property that the plaintiff may then use to satisfy a claim for unjust enrichment). An equitable lien is imposed and operates like a constructive trust, the difference being that the equitable lien provides a security interest in, rather than

complete title to, the property to which it attaches. 1 D. Dobbs, *supra*, § 4.3(3), at 601; G. Bogert & G. Bogert, *supra*, § 32, at 395-401; Restatement of Restitution, *supra*, § 161, at 650. In this case, no implication of an equitable lien is necessary, because the SPD (see note 2, *supra*) expressly provided that the plan would "have a first lien upon any recovery, whether by settlement, judgment or otherwise," that a beneficiary received from a third party. J.A. 58.[17]

d. Finally, another obvious equitable remedy that may be appropriate in an action to enforce a reimbursement term of an ERISA plan is specific performance, ordered through a mandatory injunction. A suit for an injunction to compel performance of a plan term is plainly authorized by Section 502(a)(3), because it is "[a] civil action * * * brought * * * to enjoin any act or practice which violates * * * the terms

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[17] In addition, in this case, respondent Eric Knudson agreed in the right-of-recovery agreement "that the plan may be subrogated to me or my dependent's rights for any benefits from the other party." J.A. 77. Subrogation is an equitable remedy, Restatement of Restitution, *supra*, § 162, at 653; 1 D. Dobbs, *supra*, § 4.3(4), at 605-606; G. Bogert & G. Bogert, *supra*, § 33, at 401, and is "an established branch of equity jurisprudence," 16 L. Russ, *supra*, § 222:24, at 222-52. At its core, subrogation is intended to prevent unjust enrichment. The question of when an insurer is entitled to subrogation or how much it should receive are questions of equity, even when the subrogation is expressly delineated in an insurance policy. *Id.* § 222:39, at 222-75; see also *id.* §§ 222:8, 222:9, at 222-30 to 222-34; *id.* § 222:20, at 222-47; § 222:28, at 222-61 to 222-63; see generally Restatement of Restitution, *supra*, § 162, at 653.

Although subrogation and reimbursement differ procedurally—in the former, the insurer stands in the insured's shoes against the third-party tortfeasor, while in the latter, it proceeds against the insured and only if the insured obtains a third-party recovery (see L. Russ, *supra*, § 226:1, at 226-10 to 226-12)—both have similar justifications (to prevent unjust enrichment) and substantive effects (preventing double recovery). Cf. *Stillmunkes* v. *Hy-Vee Employee Benefit Plan & Trust*, 127 F.3d 767, 770 (8th Cir. 1997) (state subrogation law covers claim under plan reimbursement clause, but is preempted by ERISA); *FMC Corp.* v. *Holliday*, *supra* (ERISA preempts application of state anti-subrogation and reimbursement statute to reimbursement provision of self-funded ERISA plan).

of the plan, or * * * to obtain other appropriate equitable relief * * * to enforce * * * the terms of the plan." 29 U.S.C. 1132(a)(3).

Unlike the other equitable remedies discussed above, specific performance arises from the parties' contractual relationship. See 4 J. Pomeroy, *supra*, § 1401, at 1033; Restatement (Second) of Contracts, at 162 (1981) ("Topic 3. Enforcement by Specific Performance and Injunction, Introductory Note"); *id.* § 357, cmts. a, c at 163, 165. The remedy is "drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires." *Id.* § 358(1), at 166; see also *id.* § 358, cmt. a, c at 166, 167-168 (court, acting in equity "to do complete justice," has considerable discretion and flexibility in molding relief); *id.* § 364, at 184 (describing types of unfairness precluding specific performance).

If adequate money damages were available here in an action at law, specific performance relief might be foreclosed. *Raton Water Works Co.* v. *Raton*, 174 U.S. 360 (1899); Restatement (Second) of Contracts, *supra*, § 360, cmt. a at 171 (specific performance not ordered where damages are adequate to protect party's "expectation interest"). *Mertens*, however, precludes the recovery of money damages against non-fiduciaries under Section 503(a)(3). Thus money damages are not available at law, and therefore an injunction ordering specific performance of the reimbursement clause is "appropriate equitable relief" under Section 502(a)(3). See *Blue Cross & Blue Shield* v. *Sanders*, 138 F.3d 1347, 1352 n.5 (11th Cir. 1998); see also 4 J. Pomeroy, *supra*, § 1403, at 1039 (specific performance available where no action at law may be maintained on the contract); Restatement (Second) of Contracts, *supra*, § 359(1) and (3), cmt. c at 169, 170 (specific performance will not be refused even if other remedies, such as restitution, are available).

C. The Absence of Wrongdoing By Respondents In The Initial Receipt Of Benefits Does Not Foreclose Equitable Relief To Require Reimbursement

The Ninth Circuit erroneously interpreted *Mertens* to limit the availability of restitution and the imposition of a constructive trust in actions under Section 502(a)(3) of ERISA to cases involving fraud or other wrongdoing in the initial receipt of payments from the plan. *Ellis*, 202 F.3d at 1248, 1249; *Cement Masons*, 197 F.3d at 1006-1007; *Owens*, 122 F.3d at 1261. Under that view, an action to enforce a plan term providing for reimbursement to the plan of funds recovered from a third party would never support an award of restitution or constructive trust because, by definition, the participant or beneficiary was authorized by the terms of the plan to receive the payment from the plan in the first instance.

A lack of wrongdoing by the participant or beneficiary in receiving the plan's payment of benefits in the first instance does not, however, render restitution or a constructive trust inappropriate in an action to enforce a reimbursement provision. First, the retention of funds received from the third-party tortfeasor by the participant or beneficiary despite his knowledge of the reimbursement obligation constitutes the wrongful *retention* of the funds, whether or not the initial receipt of the payments from the plan was lawful. See G. Bogert & G. Bogert, *supra*, § 471, at 26-29 (1978) ("Wherever equity finds * * * a wrongful holding it will give relief, whether the type of injustice is new or old. The court does not restrict itself by describing all the specific forms of inequitable holding which will move it to grant relief, but rather reserves freedom to apply this remedy to whatever knavery human ingenuity can invent.").

Second, even if the refusal by a participant or beneficiary to comply with an express reimbursement term of a plan were not viewed as wrongful holding of the funds, restitution

and imposition of a constructive trust are still appropriate remedies under this Court's precedents. The Ninth Circuit rested its contrary interpretation of *Mertens* on a statement by the Court identifying "the return of 'ill-gotten' assets or profits taken from a plan" as an example of "appropriate equitable relief" under Section 502(a)(5) of ERISA.[18] See *Owens*, 122 F.3d at 1261 (quoting *Mertens*, 508 U.S. at 260); *Cement Masons*, 197 F.3d at 1006-1007. The *Mertens* Court, however, did not purport to limit restitution to such circumstances. 508 U.S. at 260. Indeed, elsewhere in *Mertens* the Court explained, without further limitation, that "equitable relief" under Section 502(a)(3) means "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but nct compensatory damages)." *Id.* at 256 (emphasis omitted). *Mertens* thus contemplates that equitable remedies, including restitution, may be awarded whenever it would be consistent with principles of equity to do so.

Under established principles of equity, wrongdoing is not an essential element of a restitution claim. 1 D. Dobbs, *supra*, § 4.1(2), at 559; Restatement (Second) of Contracts, *supra*, § 373, at 208-209. Similarly, no showing of wrongdoing or dishonorable conduct by the person having legal title to the asset is required in order to recover through a constructive trust. Indeed, restitution through imposition of a constructive trust is appropriate even where the assets were transferred by mistake, because it is a means of preventing unjust enrichment. 1 D. Dobbs, *supra*, § 4.1(2), at 559-560; *id.* § 4.3(2), at 597-598; see also 5 A. Scott & W. Fratcher, *Scott on Trusts* § 462.2, at 313-314 (4th ed. 1989)

[18] Section 502(a)(5), 29 U.S.C. 1132(a)(5), is the parallel statutory provision that authorizes civil actions by the Secretary of Labor to redress statutory violations. It is worded similarly to Section 502(a)(3), and this Court has interpreted it accordingly. See *Harris Trust*, 530 U.S. at 248-249.

("A constructive trust may arise, however, even though the acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it.").[19] In addition, like a constructive trust, an equitable lien is not limited to cases of wrongdoing or dishonorable conduct. 1 D. Dobbs, *supra*, § 4.3(3), at 602-603.

Finally, in *Harris Trust*, the Court reaffirmed that restitution and imposition of a constructive trust under Section 502(a)(3) are governed by common-law remedial principles, not notions of wrongdoing. The Court there held that the fact that a third party "was not 'the original wrongdoer' does not insulate him from liability for restitution" to a plan of trust property transferred to him in breach of a trustee's fiduciary duty. 530 U.S. at 251.[20] And as the Court also noted, a constructive trust likewise "is based on property, not wrongs." *Ibid.* (quoting 1 D. Dobbs, *supra*, § 4.3(2), at 597); Restatement of Restitution, *supra*, § 160, cmt. d at 643 ("a constructive trust is imposed * * * to take from the defendant property the retention of which * * * would result in * * * unjust enrichment"). A court therefore may enter appropriate equitable relief to compel reimbursement

[19] See also 5 A. Scott & W. Fratcher, *supra*, § 462.2, at 313-314 (4th ed. 1989 & Supp. 2000) (noting that, under ordinary trust law, the historical limitation of a constructive trust as a remedy for breach of trust by fiduciaries has been abandoned); 1 D. Dobbs, *supra*, § 4.3(2), at 597. See also *Washington*, 187 F.3d at 711 (finding no basis "either in ERISA or in the principles of equity" for limiting "the imposition of a constructive trust in an ERISA case" to cases where "there has been a breach of trust"); accord *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Wells*, 213 F.3d 398, 401 (7th Cir.), cert. denied, 121 S. Ct. 441 (2000).

[20] The Court in *Harris Trust* emphasized that "the common law of trusts" limits restitution from "defendants other than the principal 'wrongdoer'" to instances in which the defendant had actual or constructive knowledge of the prohibited nature of the transfer. 530 U.S. at 251. No comparable concern about knowledge arises in a case such as this, because reimbursement is sought pursuant to an express term of the plan.

to the plan of payments made to a participant or beneficiary when reimbursement is required by the terms of the plan.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to that court for further consideration consistent with the analysis set forth above.

Respectfully submitted.

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MAY 2001